Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996	))))	CC Docket No. 96-146

Reply Comments of Pilgrim Telephone, Inc.

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SUMMARY

Virtually all the parties filing comments in response to the Commission's request to "refresh" the record in this proceeding have agreed with Pilgrim Telephone, Inc. (Pilgrim), on the following points.

- Ineffective and uneven regulation has had a crippling effect on the pay per call and information service industry since the time the Commission originally proposed rules in this proceeding in 1996.
- The pricing of transport for 900 services as well as unpoliced and unfair billing practices followed by incumbent local exchange carriers (LECs) have further disadvantaged the information service industry.
- Many of the key rules proposed by the Commission seven years ago would visit even further harm upon the industry by increasing regulatory burdens without any compelling public policy justification.
- The Commission should redirect its efforts by turning this rulemaking into an exercise that seeks to achieve a fair and workable balance between the statutory goals of consumer protection and promotion of pay per call and other information services.

Pilgrim believes that the problems identified in the record warrant the shift in focus in this rulemaking that many commenters advocate. Several of the commenters, for example, contend that the absence of 900 number portability continues to stifle competition and add unnecessarily to the business costs of information providers (IPs). Pilgrim urges the Commission to give equal time in this proceeding to considering steps that can and should be taken to require 900 number portability and to police and prevent

LEC billing and collection abuses that systematically deprive IPs of revenues from their information services. In addition, Pilgrim supports those commenters who argue that the Commission should abandon its proposals to require the written execution of presubscription agreements between carriers and customers, and to prohibit the issuance of "instant" calling cards to information service customers.

The Commission's proposal to adopt a *per se* evidentiary rule, that would automatically fold certain compensation and other arrangements between carriers and IPs into the statutory definition of pay per call services, has been roundly criticized and virtually unanimously opposed in the comments. Many of the commenters agree with Pilgrim that the proposed rule exceeds the Commission's statutory authority, the rule is not consistent with congressional intent, the rule is unnecessary, overly broad, and overinclusive, and the rule would impose unwarranted burdens on carriers and IPs that would result in further damage to the struggling information service industry.

Pilgrim has strongly opposed the proposed *per se* rule from the start of this proceeding and therefore endorses the opposition to the rule in this latest round of comments. The Commission must develop rules that are within the scope of its statutory authority and select the least burdensome route to reaching the Commission's policy objectives. Given the increasing economic pressures faced by IPs resulting from ill-considered policies and detrimental LEC practices, Pilgrim urges the Commission to examine closely whether its proposed *per se* rule is the minimally intrusive route to achieving compliance with the statute.

Finally, Pilgrim supports the request for clarification made by AT&T Wireless Services, Inc. (AWS), that content-rich voice information services provided by wireless

carriers should not be deemed to be covered by the requirements of Section 228 of the Communications Act of 1934 (Act). AWS has presented a convincing argument that strong public policy considerations support such a clarification, including the fact that such a decision by the Commission would help open the door for the offering of a wide array of information services by wireless carriers, thus benefiting consumers and promoting competition in the communications marketplace. Moreover, Pilgrim agrees with AWS that such a clarification would be consistent with both the spirit and text of Section 228.

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Pilgrim Telephone, Inc. (Pilgrim), by counsel and in accordance with Section 1.415 of the Commission's Rules,[1] hereby submits its Reply Comments in the above-captioned proceeding.

I. INTRODUCTION

Several conclusions have become increasingly clear during the nearly seven years since the Commission initially proposed the rules that are the subject of this proceeding. Excessive costs imposed upon information providers (IPs) who use 900 numbers for the provision of their services have forced IPs to seek the use of other dialing patterns, which are permissible under the terms of Section 228 of the Communications Act of 1934 (Act),[2] in order to maintain their viability and to continue to provide services for which there is strong demand in the marketplace.

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[1] 47 C.F.R. § 1.415.

[2] 47 U.S.C. § 228.

In addition, unreasonable and anti-competitive billing practices followed by many local exchange carriers (LECs) have illegitimately suppressed the flow of revenues to IPs, further compromising the ability of IPs to remain in business and meet the service demands of their customers.

Moreover, many of the proposals made by the Commission in the NPRM[3] not only overlook the way in which IPs are being unfairly disadvantaged in today's marketplace, but would in fact exacerbate the unwarranted difficulties faced by the information service industry by imposing new layers of requirements that are neither authorized by the statute nor reflective of sound public policy.

Virtually all the comments filed to "refresh" the record in response to the Commission's request lend support to these conclusions. Pilgrim believes that the Commission is now presented with a compelling record that buttresses the need for the Commission to "refresh" its own assessment of the goals and objectives of this proceeding. The Commission must rededicate its efforts to fashioning rules that are faithful to the congressional balance between the goal of consumer protection and the goal of enabling information providers to compete fairly in the marketplace.

II. DISCUSSION

In order for the Commission to regulate a market effectively, its rules must be clear and understandable, and they must reasonably balance competing legitimate interests, avoid creating monopoly conditions, and be uniformly and fairly enforced. In addition, of course, the regulations must adhere to the terms of the statute and the intent

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[3] In the Matter of Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996, CC Docket No. 96-146, Order and Notice of Proposed Rulemaking, FCC 96-289, released July 11, 1996 (NPRM).

of Congress. While Pilgrim is pleased that the Commission may now be initiating efforts to remedy problems of the past, in prior years the Commission has failed every one of these tests in its regulation of the pay per call and telephone information service industry.

The results have nearly ended the non-incumbent LEC sector of the industry. AT&T Corp. (AT&T) has left the 900 service business. AT&T Wireless Services, Inc. (AWS), admits it is entirely unable to offer new and valuable services to the public. Consumer choices have dwindled to a minimum. Even AT&T could not compete with the illegal providers, and could not overcome the advantages held by the Regional Bell Operating Companies (RBOCs) because of the RBOCs' control of universal billing systems. What little enforcement action the Commission has undertaken since the enactment of Section 228 has been directed against legitimate providers and has involved relatively minor issues. The Commission has rarely sought to enforce Section 228 against the clear and most egregious offenders. All of these factors have created untenable economic conditions, driving AT&T out of the IP business, keeping AWS and other wireless carriers from entering, and burdening those few legitimate companies who remain.

By failing to adopt, and more importantly, *fairly enforce*, clear, reasonable rules that are consistent with congressional intent, the Commission has inadvertently presided over the development of market conditions that are working to destroy the telephone information service industry. This potentially vibrant industry, which offers a wide range of services for which there is strong consumer demand, has been drained of its economic opportunity by an enforcement environment that inadvertently but strongly favors the RBOCs, as well as unscrupulous operators who often operate outside the jurisdiction of

the United States. The result of this enforcement environment is that very little market opportunity remains for legitimate domestic operators who strive to operate within the boundaries of the statute and the Commission's regulations. Pilgrim believes that the Commission bears responsibility for this state of affairs. With that responsibility comes the obligation for the Commission to remedy these problems.

While Pilgrim and other remaining providers continue to face an array of regulations that are out of step with congressional intent and economic reality, and that fail to provide real consumer protection balanced with consumer choice, Pilgrim is encouraged by the fact that the Commission, by seeking to refresh the record in this proceeding, may now be poised to attempt to untangle the problems that are plaguing the pay per call and telephone information services industries.

New rules may be needed, but not rules that would increase the burden of regulation imposed upon legitimate providers. Instead, new rules are needed to retrench from unnecessary and burdensome requirements, so that the Commission's rules and policies conform to the boundaries as reset by Congress in its 1996 amendments to Section 228. Efficient and effective enforcement is required against the worst offenders, but an atmosphere of flexibility and encouragement is needed in the Commission's regulation of legitimate providers. Without that commitment from the Commission, there is little doubt that the telephone information service sector could be abandoned by all but the RBOCs, or off-shore providers whose operations are entirely beyond the reach of the Commission.

Turning to the record now compiled in response to the Commission's most recent request for comments in this proceeding,[4] Pilgrim notes that parties have almost unanimously expressed concern that key elements of the Commission's proposed rules veer away from the policies and objectives that guided Congress in enacting Section 228 of the Act. These parties have urged the Commission to revisit its proposals in order to fashion rules that reflect greater adherence to congressional policies. In this regard, positions taken by Pilgrim in its Comments find considerable support in the pleadings filed by other parties.

Pilgrim also supports arguments presented in the comments that the Commission should clarify that voice information services provided by wireless carriers are not subject to the requirements of Section 228. Pilgrim believes that such a clarification would serve important public policy objectives and would also be consistent with the terms of Section 228 as well as the congressional intent underlying the statute.

A. Many of the Commenters Argue That the Commission Should Avoid Exacerbating Unfair Disadvantages Already Faced by the Information Service Industry, and Should Instead Focus on Addressing Restrictions and Unfair Practices That Hinder IPs' Business Operations.

A number of parties point out that the pay per call industry in the United States currently faces an economic crisis, that the Commission has done little to promote and encourage the growth of the industry, that Commission policies have in fact been detrimental to the industry, and that the public interest would be better served by the Commission's examining and seeking to correct obstacles that impede IPs' operations

[4] Public Notice, "The Consumer & Governmental Affairs Bureau Seeks Comment To Refresh the Record on the Commission's Rules Governing Interstate Pay-Per-Call & Other Information Services," CC Docket No. 96-146, DA 03-807, released Mar. 17, 2003 (Public Notice).

and threaten their economic well-being. *See* Brierfield Consulting (Brierfield) Comments at 1; Fox Concepts Comments at 1; John P. Lawless (Lawless) Comments at 1 (unpaginated); MicroVoice Applications, Inc. (MicroVoice) Comments at 2 (unpaginated); Windy Hill Consulting (WHC) Comments at 1 (unpaginated). Pilgrim endorses these views, all of which reinforce and support Pilgrim's position that the proposed rules would impose unwarranted and substantial burdens on information service providers, causing unnecessary and significant disruption in a highly competitive market, to the detriment of consumers as well as to the information service industry. *See* Pilgrim Comments at i.

The parties discuss several problems that plague IPs and that should be addressed by the Commission, in lieu of the Commission's single-minded pursuit of more regulatory restrictions that are not only unnecessary but will compound the problems that are undermining IPs' businesses. For example, several parties echo concerns Pilgrim has raised by complaining that the lack of 900 number portability cripples efforts by IPs to expand their businesses and ties IPs to excessive transport costs associated with 900 service. HFT, Inc., Lo-Ad Communications, TBI, and Global Charge (HFT) Comments at 10-11; Lawless Comments at 1, 3; MicroVoice Comments at 3; Network for Online Commerce (NOC) Comments at 5-6; WHC Comments at 1, 4.

Pilgrim argued in its Comments that the Commission should issue a Further NPRM in this proceeding before taking any final action on the rules it proposed nearly seven years ago, and Pilgrim believes that such a Further NPRM would serve as an effective vehicle for examining whether the Commission should endorse and require 900 number portability as an important step toward solving the problems associated with IPs'

attempts to use 900 numbers to provide their services. Given the Commission's own concerns (which Pilgrim believes to be largely unfounded) regarding IPs' attempts to develop alternative dialing patterns to evade pay per call regulations, the Commission should embrace the opportunity to make 900 numbers a more cost effective means for the provision of pay per call services.

Another problem cited by many of the commenters involves practices followed by LECs in their billing for IP services. MicroVoice, for example, criticizes the fact that policies followed by the LECs, and the lack of any regulatory requirements or oversight, have resulted in widespread consumer fraud. MicroVoice Comments at 2. MicroVoice avers that the "first time forgiveness" policy[5] has been systematically abused by both consumers and LECs, and that practices followed by the LECs' billing inquiry centers reinforce the perception of customers that they will not be held accountable for 900 service bills. *Id.*; *see* Brierfield Comments at 2; Fox Concepts Comments at 1-2; Lawless Comments at 1; WHC Comments at 1. Brierfield also argues that LECs should not be permitted to write off disputed charges as "good will" (without investigating to determine that the customer in fact did not make the call), unless the LECs also give the IPs credits against the LECs' billing and collection charges. Brierfield Comments at 4.

The barriers and obstacles faced by the information service industry, that have continued to imperil the viability of many IP businesses since the Commission issued its

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[5] Various allegations have been made that LECs typically follow the convention of automatically wiping out a charge for 900 service and crediting a customer's account if the customer's inquiry about the charge is the first such inquiry made by the customer. MicroVoice and other parties object to this practice because the LECs issue the credit without any attempt to determine whether the customer in fact made the call and therefore should be held responsible for paying the charge. *See* MicroVoice Comments at 2.

NPRM in this proceeding in 1996, warrant attention by the Commission. Pilgrim believes this is especially true in light of the Commission's frequent claims that the agency's priority is to remove regulatory impediments as much as possible and to foster competition so that the marketplace can be the arbiter of commercial success.

The information service industry has attempted to meet consumer demand for an increasingly wide array of services,[6] but at the same time the industry has been forced to struggle with the impediments and practices described in this section. Pilgrim urges the Commission, as it contemplates the panoply of restrictions and requirements proposed in the NPRM (most of which are unnecessary and should be rejected), to give equal time to the consideration of steps that can and should be taken to require 900 number portability and to police and prevent LEC billing and collection abuses that systematically deprive IPs of revenues from their information services. For example, Pilgrim specifically and strongly endorses suggestions in the comments that the Commission should prohibit the LECs' "first time forgiveness" practice.

B. There Is Virtually Unanimous Opposition in the Record to the Commission's Proposal of a *Per Se* Rule To Govern Classification of Services Within the Pay Per Call Definition.

The Commission has advanced the following proposal in the NPRM:

> Pursuant to Section 4(i) of the Communications Act, we tentatively conclude that when a common carrier charges a telephone subscriber for a call to an interstate information service, any form of remuneration from that carrier to an entity providing or advertising the service, or any reciprocal arrangement between such entities, constitutes *per se* evidence that the charge levied actually exceeds the charge for transmission. Accordingly, interstate services

[6] One commenter has observed that, since 1996, this demand for information services has carried into the wireless telecommunications marketplace. AT&T Wireless Services, Inc. (AWS), offers a variety of wireless information services and is seeking to expand its offerings in response to consumer demand. *See* AWS Comments at 2-4.

> provided through such arrangements would fit within the pay-per-call definition and, thus, be required to be offered exclusively through 900 numbers.[7]

Pilgrim has strongly opposed this proposed rule on the ground that it is overbroad and unnecessary. Pilgrim Comments at 10. Pilgrim's position is bolstered by the fact that there is vigorous and nearly unanimous opposition to the proposed rule in the refreshed record.

The arguments presented by opponents of the proposed rule fall into four general categories. First, commenters demonstrate that the Commission lacks the authority to modify the statutory definition of pay per call services. HFT Comments at 3; NOC Comments at 2. Some might argue that the proposed rule would not modify or add to the statutory definition because the intent of the proposed rule is to "clarify" that particular arrangements between carriers and IPs (*i.e.*, remuneration from the carrier to the IP, or reciprocal arrangements between the two entities) would automatically be treated as a circumstance giving rise to a conclusion that "the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call . . . ."[8]

The problem with this argument is that the *per se* evidentiary rule the Commission is seeking to fashion would cover cases in which there may be remuneration from the carrier to the IP, or there may be reciprocal arrangements between the carrier and the IP, but the caller does *not* pay charges greater than the transmission charge. Applying the requirements of Section 228 in such circumstances can only be viewed as

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[7] NPRM at para. 48.

[8] 47 U.S.C. § 228(i)(1)(B).

expanding the definition of pay per call services. Doing so would exceed the Commission's authority.[9]

Second, the Direct Marketing Association (DMA) presents convincing illustrations that the proposed rule is overbroad and overinclusive. DMA Comments at 1-2. The case made by DMA illustrates the dilemma that the proposed rule poses for the Commission. On the one hand, the fact that the proposed rule demonstrably overreaches with regard to the types of transactions and arrangements it would attempt to sweep within the coverage of Section 228 results, as we have explained, in an unauthorized expansion of the statutory definition of pay per call services. On the other hand, if the Commission were to seek to avoid this result by carving out exceptions to its across-the-board *per se* rule, such an attempt would confront the Commission with the difficult assignment of identifying and accounting for every circumstance which would have to be excluded from coverage by the *per se* rule in order to save the rule from the attack that it impermissibly broadens the statutory definition. The need for, and futility of, such an exercise, in Pilgrim's view, simply underscores the fact that the proposed rule was not a good idea in the first place and should be abandoned by the Commission.

Third, commenters correctly point out that the Commission's unauthorized expansion of the definition of pay per call services, through imposition of the *per se* evidentiary rule, would impose unwarranted burdens on carriers and IPs, and that these

[9] Pilgrim also notes that payments to third parties via commission arrangements have long been a common practice in the telecommunications industry, and such arrangements have been incorporated from time to time in tariffs approved by and on file with the Commission. The commonplace use of these commission arrangements further suggests that the Commission is going in the wrong direction when it tries to prescribe a *per se* rule that would treat compensation arrangements as automatically indicative of a pay per call service.

burdens would be accentuated by the fact that the principal interexchange carrier providers of 900 service to IPs have exited or are planning to exit the market. HFT Comments at 7, 17-18; NOC Comments at 3, 6.

Pilgrim agrees with these concerns, and we also believe that the Commission has an obligation to devise requirements that are not only within the scope of the Commission's authority and consistent with the statute, but that also represent the least burdensome route to the accomplishment of the Commission's policy objectives. The Commission has expressed its belief that the proposed *per se* rule is a "minimally intrusive [step]" necessary to achieve compliance with Section 228.[10] Given what is at stake for the IP industry in this proceeding, and the increasing economic pressures faced by IPs resulting from policies and practices we have described elsewhere in these Reply Comments, the Commission needs to examine closely whether the *per se* rule is in fact the "minimally intrusive" route to achieving compliance with the statute.

Finally, commenters have demonstrated that the *per se* rule simply is not necessary. NOC observes, for example, that there is no policy basis for casting the pay per call service definitional net to include domestic or international information service long distance calls that are billed at reasonable and customary rates. NOC Comments at 7; *see also* Lawless Comments at 3; MicroVoice Comments at 3; WHC Comments at 3. The statute requires the Commission to adopt rules that "increase consumers' protection" and "promote the development of legitimate pay-per-call services."[11] Consumers do not need to be protected from reasonable and customary long distance rates, and the

[10] NPRM at para. 60.

[11] *Id.* at para. 4.

promotion of pay per call services will not be promoted by the Commission's attempt to expand the definition of pay per call services in order to impose burdens on a broader range of IP services.

Only one lone commenter — AT&T — attempts to come to the defense of the Commission's proposed rule. AT&T's arguments, however, are marred by flaws which result in AT&T's failing to provide any persuasive basis or justification for the Commission's unauthorized, overly broad, and unnecessary proposal.

First, AT&T is a recent convert to its own argument. In its initial comments in this proceeding in 1996, AT&T expressed concerns about the wisdom of the Commission's proposed *per se* rule, drawing attention to the fact that the rule could have the effect of prohibiting benign and economically efficient arrangements between carriers and IPs. AT&T 1996 Comments at 5, 8; *see* AT&T Further Comments at 7. In arguing that the Commission should abandon a *per se* rule in favor of creating a rebuttable presumption,[12] AT&T noted in its earlier comments that "[a]rrangements between carriers and their customers take myriad forms, and will likely take on new patterns with the advent of local competition, many of which are economically efficient and do not lead to abuses." AT&T 1996 Comments at 8. Although AT&T has now reversed field by

[12] Pilgrim opposes AT&T's earlier suggestion that a rebuttable presumption should be established in lieu of a *per se* rule. Given the fact that the proposed rule is overly broad because it reaches transactions and arrangements that were not intended by Congress to be included within the scope of the prohibitions and requirements of Section 228, this unfairness would be compounded if carriers and IPs were forced to bear the burden of rebutting a presumption that their activities fall within the classification of pay per call services. Pilgrim stresses that, as virtually all the commenters have argued, the best result would be for the Commission to abandon the proposed *per se* rule and not to substitute any other attempt to expand the definition of pay per call services beyond the plain meaning of the statute.

supporting an overly broad *per se* rule, Pilgrim believes that the reservations expressed by AT&T in 1996 have more merit than AT&T's new-found views.

As Pilgrim and other commenters have explained, it simply is not sound or defensible public policy to devise a rule that will impose penalties, burdens, and economic hardships on carriers and IPs who are engaging in transactions that in no way fall within the bounds of the deceptions and abuses that the Commission is intent upon prohibiting. Pilgrim endorses the Commission's efforts to curb and penalize the activities of unscrupulous carriers and other operators who attempt to game the system for their own economic rewards. The activities of these opportunists are detrimental not only to consumers but to carriers and IPs who provide legitimate services and strive to comply with statutory and regulatory requirements. But the Commission has a responsibility to aim its prohibitions at the perpetrators, and to avoid launching an unguided missile that causes collateral damage to legitimate carriers and IPs. The proposed *per se* rule demonstrably fails to meet this responsibility, as AT&T recognized seven years ago. Since that time, nothing has changed the fact that the rule, if adopted, would cause the same harm now that it would have caused in 1996.

Second, the reason that AT&T advances to explain its about face in now embracing the Commission's expansive *per se* rule points to asserted problems that go beyond the scope of the statute and this rulemaking proceeding. AT&T references cases in which it and other interexchange carriers have been victimized by "traffic pumping" arrangements that have increased the level of access charges imposed on the interexchange carriers. AT&T Further Comments at 2-3. AT&T framed the argument as follows in its initial comments:

> [T]he charges a caller pays cannot reasonably be deemed the only test of whether a call should be treated as pay-per-call. Section 228(i)(1)(B) defines "pay-per-call" as those services for which a "*caller*" pays a charge that is greater than the charge for completion of his or her call. However, it would be patently unreasonable to assume that by using this phrasing Congress intended to tie the Commission's hands, preventing it from taking any action to stop unscrupulous IPs from simply shifting charges from callers to IXCs.

AT&T 1996 Comments at 3 (emphasis in original). The problem with this argument is that it ignores the fact that the Commission is bound to follow the terms of the statute, and those terms are not ambiguous. In enacting Section 228, Congress sought to focus on the prevention of harm to end user customers that could result from deceptive or abusive practices by carriers or IPs. As we have noted, the Commission has recognized this congressional purpose in this proceeding.[13]

The text of Section 228(i)(1)(B) reflects this purpose by making the definition of pay per call services turn on payments that end user customers are required to make. The reference to "caller" in Section 228(i)(1)(B) means what it says, and is reflective of an informed decision to restrict the application of Section 228 to the protection of consumers. It also is the case that AT&T admits that the services involved are charged to consumers at normal local or long distance rates, and AT&T demonstrates that substantial volumes of traffic are flowing over these services, without any mention by AT&T of any consumer complaints. AT&T seems to prove the thesis that, at least from a consumer point of view, these services are highly valued, are used extensively by the public, and have produced few, if any, complaints.

Moreover, it is unreasonable for AT&T to contend that Congress, in making this choice to reference payments made by callers, intended to tie the Commission's hands.

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[13] See note 11, *supra*, and accompanying text.

Such a suggestion implies that the Commission lacks any mechanism to deal with the "traffic pumping" arrangements that are the target of AT&T's concerns. This, however, is not the case. The Commission has the authority to address whether such arrangements amount to unjust or unreasonable practices, or unjust or unreasonable access rates, in violation of Section 201(b) of the Act, or involve discriminatory practices in violation of Section 202 of the Act. Parties claiming injury may file complaints pursuant to Section 208 of the Act to seek the imposition of remedies. AT&T and other parties are free to file petitions for rulemaking if they are of the view that the Commission should enforce the Section 201(b) or Section 202 prohibitions through rules that address specific carrier arrangements that impose unjust, unreasonable, or discriminatory access rates, or constitute unjust, unreasonable, or discriminatory practices, to the detriment of interexchange carriers.[14]

Given the fact that, contrary to AT&T's intimations, the Commission has various means to solve the problem AT&T has identified, there is no basis for insisting upon a solution that not only would extend the Commission beyond the bounds of the statute but would also encumber the operations of carriers and IPs that are pursuing legitimate arrangements that bring no harm to end user customers. Because the proposed *per se* rule would result in precisely those consequences, it must be rejected.

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[14] Even assuming that there is no other remedial authority at the Commission's disposal (which is not the case), such circumstances would not justify the expansive reading of Section 228(i)(1)(B) that AT&T advocates. It would exceed the Commission's authority to expand the scope of the statutory definition beyond the plain meaning of the statutory text. *See* Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) (the courts, as well as Federal agencies, must give effect to the unambiguously expressed intent of Congress), *cited in* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) at para. 656, n.1724. To the extent that the statute fails to address carrier or IP practices that AT&T deems to be harmful to its interests, AT&T's remedy is to seek revision of the statute.

Third, AT&T inadvertently exposes the problematic nature of the proposed *per se* rule by lobbying for its own exceptions to the rule. In counseling that "[t]he ban on these illicit arrangements must not be overly broad[,]" AT&T Further Comments at 10 n.22, AT&T contends that certain international settlement and commission arrangements should not be caught up in the net of the *per se* rule. AT&T's pointing to the need to carve out exceptions to the *per se* rule lends further weight to the conclusion, which we have discussed earlier in these Reply Comments, that the proposed rule is an ill-conceived attempt to do more than the statute permits and to do it in a way that would impose unwarranted restrictions and burdens on legitimate carrier arrangements.

The Commission is likely to achieve a more workable and fair result if it seeks to fashion a less intrusive remedy, instead of pursuing a *per se* rule and grappling with a range of carve-out exceptions to the rule. Moreover, given the consumer protection problems associated with international pay per call services and activities, a Commission attempt to craft an exception to its proposed *per se* rule may not be as straightforward as AT&T suggests, and could run the risk of further embroiling the Commission in difficult line-drawing issues regarding what would and would not be covered by the rule.

Finally, one other issue raised by AT&T warrants mention. AT&T attempts to rely on a letter issued by a division of the Commission in 1995 for the proposition that revenue sharing agreements between carriers and IPs, under which carriers remit to IPs a portion of transport charges for calls placed to the IP through the use of dialing patterns other than 900 numbers or toll-free numbers, would violate Section 228 of the Act. AT&T Further Comments at 6 & n.14, *citing* Letter from John B. Muleta, Chief,

Enforcement Division, Common Carrier Bureau, to Ronald J. Marlowe, 10 FCC Rcd 10945 (1995) (*Marlowe Letter* or *Letter*).[15]

Pilgrim does not believe that AT&T's contention has any merit. As Pilgrim has pointed out in our Comments,[16] the full Commission has recently addressed arrangements of the type at issue in the *Marlowe Letter* and has rejected AT&T's claims that the arrangements should be held to be unlawful under Section 201(b) or Section 202(a) of the Act, expressly overruling the *Marlowe Letter* to the extent inconsistent with this finding.[17] While it is true, as AT&T points out,[18] that the Commission in *Jefferson* did not take up the conclusion in the *Marlowe Letter* that the arrangement at issue in *Marlowe*

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[15] In the *Marlowe Letter*, the Enforcement Division explained that the case involved:

> certain information and/or entertainment programs provided pursuant to tariffed rates for international communications services. Your inquiry is made on behalf of clients who apparently are interested in tariffing "international long distance services" for the transmission of information and/or entertainment programs. You present scenarios whereby calls to foreign destinations providing audio information programs would be transmitted through three different dialing sequences: (1) 10XXX + international number; (2) 1-500-NXX-XXXX; or (3) 1-700-NXX-XXXX. In each case, the calls would be transmitted by an entity authorized to provide international direct dialed telecommunications services pursuant to Section 214 of the Communications Act . . . at a tariffed rate. Calls to the international information programs would be billed to telephone subscribers at that tariffed rate as standard toll charges. No charges would be assessed by the information provider directly to the caller or subscriber. You ask whether the legality of the arrangement would be affected if: (1) the carrier remits a portion of the transport charge to the party advertising the destination number; or (2) the carrier remits a portion of the transport charge to the destination entity for providing the information. *Marlowe Letter*, 10 FCC Rcd at 10945.

[16] Pilgrim Comments at 10-14.

[17] AT&T v. Jefferson Tel., File No. E-97-07, 16 FCC Rcd 16130 (2001) (*Jefferson*).

[18] AT&T Further Comments at 6 n.14.

violated the letter and spirit of Section 228,[19] neither did the Commission voice any concerns that the revenue sharing arrangement challenged by AT&T in *Jefferson* raised any sort of consumer protection concerns that might implicate the policies underlying Section 228.

To the contrary, the Commission emphatically rejected AT&T's claims, finding that the fact that the agreement between Jefferson Telephone and the IP (International Audiotext Network) required the IP to engage in certain marketing practices, and required Jefferson to block certain local calls to the IP, fell "far short of giving Jefferson an unlawful interest in [the IP], given that . . . Jefferson provided interstate access services indifferently and indiscriminately to all who requested them."[20]

Another problem with AT&T's reliance upon the *Marlowe Letter* is that the Enforcement Division did not present any analysis to explain its conclusion that the arrangement at issue would violate the "letter" of Section 228. Significantly, the Division made no attempt to explain how consumers might be harmed by the arrangement. And, in any event, the Division's decision in *Marlowe* does not lend any support for a conclusion that a *per se* evidentiary rule is advisable or justified. Moreover, while the Division did opine about congressional intent, it did not engage in any discussion of whether a blanket rule of the type the Commission proposed a year after the decision in *Marlowe* would be permissible or would instead extend beyond the plain words of Section 228. For this reason, the Division's discussion in *Marlowe* does nothing to assist the Commission here

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[19] The Commission pointed out that AT&T's cursory argument that Jefferson Telephone's arrangements sought to evade the requirements of Section 228 was raised too late in the complaint proceeding and therefore would not be addressed. *Jefferson*, at para. 6, n.18.

[20] *Id.* at para. 12.

in deciding whether its proposed rule would exceed its regulatory authority. As Pilgrim and others have argued in this proceeding, there are strong reasons to conclude that the proposed rule would in fact take the Commission beyond its authority to administer and enforce the statute.

C. The Commission Should Grant the Request for Clarification Made by AT&T Wireless Services That the Pay Per Call Rules Do Not Apply to Information Services Offered by Wireless Carriers.

AWS argues that "the Commission should make clear that content enriched information services offered by CMRS [Commercial Mobile Radio Service] providers are not subject to the Commission's pay-per-call requirements." AWS Comments at 4.

Pilgrim supports the argument presented by AWS because Pilgrim believes there are convincing public policy reasons for the Commission to take such an action, and because such an action would be consistent with congressional intent in enacting Section 228 of the Act. If the Commission is reluctant to reach a final determination regarding AWS's clarification request based upon the present record, then Pilgrim believes that, at a minimum, the Commission should initiate a further rulemaking in this proceeding to explore in greater detail both the proposal advanced by AWS and alternative means of fostering wireless-based information services. Pilgrim also believes that there is a basis for the Commission to forbear from the application of Section 228 in the case of wireless carriers. These issues are discussed in turn in the following sections.

1. Public Policy Considerations Support a Finding by the Commission That Wireless-Based Information Services Should Not Be Subject to Section 228 Requirements.

The proposal advanced by AWS provides an important opportunity for the Commission to pay greater attention to a responsibility that thus far has been neglected in the Commission's actions and deliberations regarding implementation and enforcement

of Section 228. Specifically, the Commission has done little to promote the development of what AWS characterizes as content enriched voice information services.

The Commission has focused its effort on devising mechanisms intended to protect consumers from deceptive and abusive practices. While these efforts are important, and in fact have been mandated by Congress in its passage of Section 228, the Commission's myopic approach to its task, as reflected by its proposals in this rulemaking, would impose unnecessary and burdensome requirements on legitimate carriers and IPs who pose no threat to consumer well-being and are striving to meet consumer demand for a wide array of information services. Still worse, the Commission's approach in this rulemaking sidesteps the congressional mandate that the Commission must seek ways to promote the growth and vitality of an information service industry that has been successful in other countries[21] but has struggled in the United States because of regulatory burdens and unfair carrier practices that have been described elsewhere in these Reply Comments.

Against this backdrop, it is incumbent upon the Commission to give consideration to AWS's request for clarification. Pilgrim believes that such consideration should lead to the conclusion that granting AWS's request would be an effective way to promote the development and delivery of a rich array of information services to consumers and to promote greater competition in the information services marketplace. Several reasons support this view.

First, wireless platforms for information services hold the prospect for the development and deployment of a wide range of innovative services. AWS, for example,

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[21] *See* Brierfield Comments at 1-2; *see also* WHC Comments at 2.

explains that it could enhance its current offerings in order to provide services and products such as stock quotes, airline information, weather, traffic, and sports reports, hotel and rental car reservations, downloadable games, ring tones, and graphics, personalized song dedications or wake up calls to other parties, and portals for access to community chats and message boards and to content furnished by third party providers. AWS Comments at 3-4.

Given the fact that there has been strong consumer demand for wireless data-based information services[22] (which are not subject to the requirements of Section 228), it is reasonable to conclude that, if regulatory obstacles were removed, there would also be strong consumer demand for wireless content-rich voice services. Taking steps to facilitate the delivery of these voice services to the marketplace would advance the congressional mandate that the Commission should encourage the development and growth of IP services.[23]

Promoting the availability of such services would also be consistent with long-standing Commission policies favoring the development of innovative wireless services,[24] and with Commission policies favoring market forces, and not regulation, as

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[22] *See, e.g.*, Verizon Wireless Press Release, "In Just Six Months, Get It Now℠ Proves Itself as an Overachiever," Apr. 30, 2003 (in the six months since the launch of Get It Now, a service that enables customers to download entertainment and productivity tools over the air, consumers have downloaded 8.5 million Get It Now games, ring tones, entertainment applications, and other applications).

[23] It also should be noted that Congress has instructed the Commission to eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services . . . ." 47 U.S.C. § 257(a).

[24] *See, e.g.*, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, Second Report and Order, FCC 94-61, 9 FCC Rcd 2348 (1994) (*Competitive Bidding Second R&O*), at para. 3 ("Structuring our [spectrum

the best means to promote wireless services that benefit consumers and foster competition.[25] The Commission has seen the wireless industry as an important player in the telecommunications marketplace, representing a potential competitive counterweight to wireline carriers in local markets, and the Commission has looked to the wireless industry as an important source of cutting edge technologies that can bring affordable, next generation services to a wide spectrum of business and consumer markets.[26] Using wireless platforms for the delivery of content-rich voice information services should be the next step along a continuum of Commission efforts to facilitate realization of the potential of wireless carriers to expand the horizon of services available to American consumers.

Second, application of the Section 228 requirements to wireless-based voice information services would hamstring the ability of wireless carriers such as AWS to

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auction] rules to promote opportunity and competition should result in the rapid implementation of new and innovative services and encourage efficient spectrum use, thus fostering economic growth.").

[25] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Third Report, 13 FCC Rcd 19746 (1998) at 5 ("Telecommunications devices exist today that were not imagined only a few years ago. The Commission does not wish to impose regulations that will slow the emergence of new, innovative technologies."); Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Second Report, 12 FCC Rcd 11266 (1997) at 3 ("The Commission has continued systematically to remove regulatory barriers in order to facilitate competition."), *cited in* Kathleen Q. Abernathy, *My View from the Doorstep of FCC Change*, 54 FED. COMM. L.J. 199, 205 (2002).

[26] The Commission has recognized that "new wireless services . . . have great potential to stimulate economic growth and create thousands of jobs for Americans." *Competitive Bidding Second R&O*, at para. 4. *See also* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Sixth Report, 16 FCC Rcd 13350 (2001) at 82 (competition has been instrumental in shaping the mobile data sector).

bring to market many of the types of services described above. Evidence of this is the fact that, even though wireless-based data information services such as Verizon's Get It Now[SM] Service are prospering in the marketplace, voice-based information services have not emerged.

This state of affairs is explained in part by the uncertainty caused by the fact that the Commission proposed Section 228 rules in this proceeding that would have a stultifying effect on the offering of these wireless-based voice information services, and then put the proposed rules on the shelf for nearly seven years. But AWS also makes a convincing case that the services it plans to offer would be financially infeasible if the services were made subject to Section 228 requirements. AWS Comments at 5-6. Pilgrim believes that the Commission should give careful consideration to the concern that the panoply of Section 228 requirements, together with its proposed rules, would choke off wireless carriers' efforts to bring new services to the communications marketplace.

Third, while the Commission is rightfully committed to protecting consumers, it should also be committed to taking actions that benefit consumers (in addition to protecting them from deceptive or abusive practices). Overly cautious fixation on the former objective can have the effect of paralyzing Commission efforts to pursue the latter objective. There is strong reason to believe that the types of services AWS would like to offer would be greeted enthusiastically by consumers. The level of competition in the wireless marketplace also ensures that AWS's offerings would be matched by other carriers, giving consumers the benefit of a variety of affordable and innovative voice information services. While Pilgrim is by no means suggesting that the Commission should overlook or give little emphasis to its obligation to protect consumers from

unreasonable or unfair practices, we do believe that the Commission's pursuit of this objective should not be allowed to block the flow of affordable, new services to the marketplace. Such a result is a loss — not a victory — for consumers.

Finally, Pilgrim believes that granting AWS's request would promote the provision of a diverse range of information services to consumers because it would help to counteract the adverse impact on the information service industry caused by the diminishing number of interexchange carriers who transport pay per call service traffic. Commenters have pointed out that all of the major interexchange carriers are exiting the market. HFT Comments at 17-18; NOC Comments at 8-9. In the meantime, AT&T has taken advantage of the limited options available to IPs by charging steep rates for transport. *See* WHC Comments at 1. Providing the clarification sought by AWS would enable wireless carriers to open up a transport pipeline for voice information services, thus helping to revitalize an industry that has been increasingly crippled by the reduction of transport options.

2. The Clarification Sought by AWS Would Be Consistent with the Policy Objectives and Congressional Intent Reflected in Section 228 of the Act.

Pilgrim supports the claims presented by AWS that imposition of the Section 228 requirements on wireless carriers "would not advance the public policy concerns that fueled passage of Section 228." AWS Comments at 7. Stated another way, a Commission clarification that the requirements of Section 228 do not apply to wireless-based voice information services, in Pilgrim's view, would not threaten or dilute the Commission's consumer protection policies.

The reason for this is that policing mechanisms are in place that would discipline the offerings and practices of wireless carriers so as to ensure that consumers would not

be harmed by deceptive or abusive practices. One such mechanism is the wireless communications marketplace. The highly competitive nature of this marketplace would tend to suppress any efforts by unscrupulous operators to design and carry out schemes to bilk consumers. Wireless carriers involved in the provision of voice information services would be highly motivated to curb such activities to avoid the adverse consequences that would result from the carriers' being associated in any way with service schemes designed to harm consumers. The adverse publicity and customer dissatisfaction that would ensue would translate into the loss of existing customers and difficulties in attracting new customers. These are risks that carriers seek to avoid in a highly competitive marketplace.

The disciplining power of the wireless marketplace should not be underestimated. Wireless carriers have a strong incentive to prevent their being tarred by practices that lead to customer dissatisfaction. This, of course, is because customers have the option to take their business elsewhere in the competitive wireless marketplace. This customer option will be strengthened even further when the Commission's wireless number portability requirements take effect later this year.

An additional reason that a Commission clarification that Section 228 does not apply to wireless-based voice information services would not undermine the Commission's consumer protection policies is that the types of services that would be made available by wireless carriers are far removed from the types of activities that prompted Congress to enact Section 228. *See* AWS Comments at 8.

Although Pilgrim believes that public policy considerations are important in weighing the advisability of clarifying Section 228 in the manner sought by AWS, and

although Pilgrim also supports the views advanced by AWS that such a clarification would be consistent with congressional intent in enacting Section 228, Pilgrim also recognizes that the clarification sought by AWS must make sense within the four corners of the statute itself. As we have noted elsewhere in these Reply Comments in our discussion of the Commission's proposed *per se* evidentiary rule regarding the scope of the statutory definition of pay per call services, the Commission's rulemaking authority is circumscribed by the requirement that its actions must be consistent with the text of the statute.

The mechanism advocated by AWS for effecting the clarification, in Pilgrim's view, passes this test. AWS points to the directory services exception included in the statutory definition of pay per call services, and argues that the Commission should clarify that the types of wireless content-rich voice information services proposed to be offered by AWS will be treated as directory services and will thus fall within the Section 228(i)(2) exception.

The fact that Congress chose to leave the term "directory services" undefined gives the Commission discretion to develop its own definition of the term, so long as the definition is not inconsistent with the purposes and objectives of Section 228. As AWS points out, the Commission has already rejected suggestions to adopt a narrow definition of the term, finding that doing so would disturb the congressional consideration and balancing of interests in its definition of pay per call services. AWS Comments at 6.[27]

[27] Although the Commission chose to take no action regarding the definition of directory services when it adopted rules implementing Section 228 in 1993, the NPRM adopted by the Commission in this proceeding reflects the Commission's tentative decision that there are cases in which the Commission must act proactively to interpret the statute in order to better achieve the balancing of interests intended by Congress. One example of this

It is reasonable to conclude that Congress carved out directory services from its definition of pay per call services at least in part because of a conclusion that the provision of directory services would be unlikely to generate any concerns regarding deceptive or abusive practices and that, therefore, it was not necessary to bring to bear the protections enacted by Congress in Section 228. In reviewing the types of services that AWS proposes to offer, the Commission should reach the same finding, namely, that these services, when offered pursuant to the mechanisms AWS describes in its pleading,[28] do not pose any dangers to consumer interests that would warrant application of the Section 228 requirements. On that basis, the Commission should conclude that the clarification sought by AWS is warranted and would be consistent with the letter and spirit of Section 228.

3. At a Minimum, the Commission Should Initiate a Further Rulemaking in This Proceeding To Develop Alternative Means of Promoting Wireless-Based Voice Information Services.

The Commission may conclude that it is not appropriate to take final action on AWS's proposed clarification at this time because the issue requires further examination

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approach by the Commission is its proposed *per se* evidentiary rule. Pilgrim has voiced its opposition to this proposed rule and has noted that the proposal has been almost unanimously criticized in the most recent round of pleadings. Pilgrim believes, however, that acting to clarify that the services proposed by AWS will be treated as falling within the definition of directory services is an interpretation in which the Commission should engage. Without such an action by the Commission, the balancing intended by Congress between consumer and industry interests will not be achieved in the case of wireless services.

[28] AWS Comments at 8.

and comment, and because the Commission should have an opportunity to formulate and present for comment its own proposals with respect to the issues raised by AWS.[29]

As we have discussed, Pilgrim supports the clarification sought by AWS because we believe a strong case has been made that policy considerations support the clarification and that the clarification would be consistent with the terms of the statute and would be reflective of congressional intent. But Pilgrim also urges the Commission that, if it harbors any doubts about the efficacy of AWS's proposal based upon the current record, then the Commission should, at a minimum, issue a Further NPRM in this proceeding to give interested parties a further opportunity to review and comment on AWS's proposal, and also to give the Commission a chance to propose possible alternative means for attaining the policy objectives that are the basis for AWS's proposed clarification.

In a Further NPRM the Commission could explore, for example, whether it has discretion to create "safe harbors" for wireless carriers with respect to the subscription agreement requirements in Section 228, based upon determinations by the Commission in particular cases that arrangements and mechanisms established by wireless carriers for their subscribers' ordering and use of information services are sufficiently effective in protecting consumers to warrant a finding that the wireless carriers are not required to make any further demonstration of their adherence to the subscription agreement provisions of Section 228.

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[29] Pilgrim in fact believes that a Further NPRM is warranted as a general matter in this proceeding because of changed circumstances since the Commission initially presented its tentative views and proposals in 1996. Pilgrim has urged the Commission to adopt a Further NPRM before taking any final action in this proceeding. Pilgrim Comments at ii, 20-21, 32-33.

Such an approach could be based in part on a finding that the risks of unauthorized calls to access a carrier's or an IP's services are lower in the case of wireless services than they are in the case of wireline services. Personal Communications Service (PCS) users, for example, can block the use of their cellphones by unauthorized users by using a code to lock the phones' keypads. In addition, the digital signals transmitted by cellphones are scrambled in a manner that helps to defeat efforts to hijack cellphone information for unauthorized use of a subscriber's account.[30]

An important aspect of "refresh[ing] the record regarding the issues outlined in the Notice of Proposed Rulemaking"[31] is to take into account circumstances that have changed since the Commission initially outlined its views regarding the need for additional rules to implement Section 228. The continued burgeoning growth of wireless telecommunications since Section 228 was first enacted and then amended in 1996 represents an important changed circumstance, in part because the use of wireless information-rich voice information services involves issues that could not have been fully contemplated when the statute was enacted and later amended. This is illustrated most forcefully by AWS's demonstration that wireless carriers would be virtually precluded from offering such services in the absence of the clarification requested by AWS. Pilgrim therefore urges that, if the Commission is hesitant to adopt the clarification based on the current record, then the Commission at a minimum should initiate a further rulemaking to

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[30] Most wireless phones today operate on digital platforms. *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Seventh Report, FCC 02-179, released July 3, 2002, at 6 ("At the end of 2001, digital customers made up almost 80 percent of the industry total, up from 72 percent at the end of 2000.").

[31] Public Notice at 1.

examine other forms of relief that will enable wireless carriers to compete in the provision of voice information services.

4. Regulatory Forbearance for Wireless Information Services Is Justified and Should Be Granted by the Commission.

Pursuant to Section 332(c)(1) of the Act,[32] the Commission may grant regulatory forbearance from the applicability of any provision of Title II of the Act (except Section 201, 202, and 208). The Commission's list of sections which are not currently subject to forbearance is found at Section 20.15(a) of the Commission's Rules.[33] The Commission has, on numerous occasions, extended forbearance to wireless carriers from the applicability of various Title II requirements.[34] Pilgrim believes that forbearance from the provisions of Section 228 should also be extended to wireless providers.

The principal objectives of Section 228 are to ensure that consumers are aware of the charges for information services, and that the subscriber either incurs the charges or authorizes the charges. These objectives were discussed in the legislative history of the

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[32] 47 U.S.C. § 332(c)(1).

[33] 47 C.F.R. § 20.15(a).

[34] *See, e.g.*, Personal Communications Industry Association's Petition for Forbearance for Broadband Personal Communications Services, Biennial Regulatory Review — Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations, Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, WT Docket No. 98-100, Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, GN Docket No. 94-33, GTE Petition for Reconsideration or Waiver of a Declaratory Ruling, MSD-92-14, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857 (1998) (Commission forbore from requiring CMRS providers to file tariffs for most international services, and from applying most of Section 226 of the Act, relating to telephone operator services); Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411 (1994) (Commission forbore under Section 332(c)(1)(A) of the Act from requiring wireless providers to comply with the tariff filing obligations of Section 203, the domestic market entry and market exit requirements of Section 214, and several other provisions of Title II of the Act).

statute, and have been the subject of proceedings at both the Commission and the Federal Trade Commission. Each of these objectives has been discussed extensively in the context of wireline services, but never in the context of wireless services. Pilgrim submits that the reasons which make the Section 228 protections important for wireline services have no applicability to wireless services.

Wireline services consist of the establishment of a geographically fixed point of communications. The instrument used to access wireline communications is permanently fixed at one point, and anyone with access to that geographic location can make a call on the wireline instrument. It is precisely because of the general availability of a wireline instrument to persons other than a subscriber that Section 228 protections were deemed to be necessary.

Wireless phones and services are fundamentally different from wireline services. Wireless phones are not geographically specific, but are individual specific. Individuals carry them like they carry credit cards, and have continuous control over who uses the phones. All of the terms and conditions of service, and charges, are covered by agreements with the wireless providers. In this sense, wireless phones, unlike wireline phones, have the characteristics of both written presubscription agreements and credit cards. These unique aspects of the service arrangements between wireless carriers and their customers provide safeguards to wireless customers with regard to the types of consumer abuses that prompted enactment of Section 228. The presence of these safeguards supports a finding that enforcement of Section 228 in the case of wireless

carriers is not necessary for the protection of consumers,[35] and that, therefore, the Commission should forbear from enforcing Section 228 in the case of wireless carriers.

In fact, the wireless industry is moving toward having cellphone accounts operate as credit instruments, where consumers can use their cellphones to purchase products and services, and have those items charged to the cellphone bill. As wireless phones, and the accounts under which usage is charged, are being used as charge instruments themselves, they are essentially exempt under the calling card or credit card exemptions, at a minimum, or could easily fall within the written presubscription agreement exemptions.

Pilgrim believes that the Commission has the authority and ability in this proceeding to find that in instances where wireless providers set forth the terms and conditions of the provision of information services over their networks, or any information providers disclose all of the terms and conditions on a per call basis, that such services may be provided under the relevant exceptions under Section 228. In the event that the Commission does not believe that it can either exercise forbearance, or adopt an application of the exemptions to wireless providers, based upon the current record, then Pilgrim urges the Commission to address such issues in a Further NPRM in this proceeding.

D. Commenters Agree That the Proposed Requirement That Presubscription Agreements Must Be Executed by Customers Would Be Burdensome and Unnecessary.

WHC argues that requiring customers to sign presubscription agreements in writing "is the antithesis of the purpose of 900 service." WHC Comments at 2; *see also* Lawless Comments at 1; MicroVoice Comments at 2 (requiring written signatures from

[35] See Section 332(c)(1)(A)(ii) of the Act, 47 U.S.C. § 332(c)(1)(A)(ii).

customers for presubscription agreements would violate "the entire concept of 900 service"). Pilgrim agrees with these concerns[36] and urges the Commission not to adopt any requirement for the written execution of presubscription agreements.

E. Commenters Oppose the Proposed Rule that Pay Per Call Customers Must Be Issued Actual Credit Cards Before They May Use Pay Per Call Services.

MicroVoice contends that the Commission's proposal that pay per call customers must use pre-existing cards that have been delivered by the carrier or IP to the customers before they use the service would impose "an unreasonable burden on both the consumer and the Information Provider." MicroVoice Comments at 3. MicroVoice goes on to explain that:

> [o]ne of the main reasons there is demand for PPC services is that the consumer can get the information quickly, the transaction can be completed easily, and the billing method is convenient. If a pre-existing card is required then both the consumer and the information provider will lose many of the benefits of PPC services. *Id.*

See also Lawless Comments at 2; WHC Comments at 3. Pilgrim shares these concerns and urges the Commission to refrain from adopting its proposal and to permit carriers and information providers to continue providing immediate access to credit through calling cards, when a card is ultimately issued by the carrier. These cards have become widely used during the seven years since issuance of the NPRM and, as Pilgrim noted in our Comments, no problems have emerged that would warrant requiring the end of this practice. Pilgrim Comments at 27.

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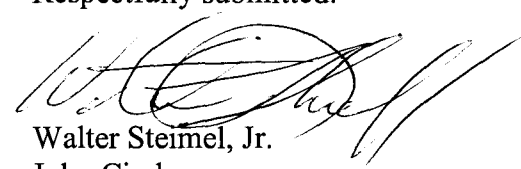
[36] Pilgrim Comments at 16 ("Congress rejected any requirement that the customer must execute the agreement, deciding instead that the advance provision of information to the customer about the terms and conditions of the service would provide consumers with sufficient protection.").

III. CONCLUSION

The latest round of pleadings in this proceeding strongly support the position that Pilgrim has taken from the outset, namely, that the Commission should reject the rules proposed in the NPRM, and should craft a new set of rules that is not only consistent with the text of Section 228 and the intent of Congress in passing that legislation but also focuses on policies that will remove unfair disadvantages currently faced by the information service industry. In doing so, the Commission will achieve a proper balancing between consumer protection and the promotion of pay per call and other information services.

Respectfully submitted:



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